Supreme Court, U.S.
FILED
DEC 3 _ 2003
OFFICE OF THE CLERK

(4)

No. 03-501

In the Supreme Court of the United States

STANFORD HOSPITAL AND CLINICS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

THEODORE B. OLSON
Solicitor General
Counsel of Record
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

ARTHUR F. ROSENFELD
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
JOHN EMAD ARBAB
Assistant General Counsel
National Labor Relations Board
Washington, D.C. 20570

BEST AVAILABLE COPY

22 pp

QUESTION PRESENTED

Whether the National Labor Relations Board reasonably concluded that petitioner, an acute-care hospital, committed an unfair labor practice by promulgating an overbroad employee solicitation and distribution policy.

TABLE OF CONTENTS

	Page
Opinions below	1
Jurisdiction	1
Statement	2
Argument	8
Conclusion	18

TABLE OF AUTHORITIES

Cases:

Baylor Univ. Med. Ctr. v. *NLRB*, 662 F.2d 56 (D.C. Cir. 1981)	15
Beth Israel Hosp. v. *NLRB*, 437 U.S. 483 (1978)	2, 11, 12, 17, 18
Brockton Hosp. v. *NLRB*, 294 F.3d 100 (D.C. Cir. 2002), cert. denied, 537 U.S. 1105 (2003)	6, 17
Central Solano County Hosp. Found., Inc. (Intercommunity Hosp.), 255 N.L.R.B. 468 (1981)	15
Doctor's Hosp. of Staten Island, Inc., 325 N.L.R.B. 730 (1998)	15
Eastex, Inc. v. *NLRB*, 437 U.S. 556 (1978)	7
Goldblatt Bros., 77 N.L.R.B. 1262 (1948)	13
International Ladies' Garment Workers' Union v. *Quality Mfg. Co.*, 420 U.S. 276 (1975)	13
NCAA v. *Smith*, 525 U.S. 459 (1999)	17
NLRB v. *Baptist Hosp., Inc.*, 442 U.S. 773 (1979)	2, 12, 14-15
NLRB v. *Southern Md. Hosp. Ctr.*, 916 F.2d 932 (4th Cir. 1990)	17
Presbyterian/St. Luke's Med. Ctr., 258 N.L.R.B. 93 (1981), enforced, 723 F.2d 1468 (10th Cir. 1983)	15
St. John's Hosp. & Sch. of Nursing, Inc., 222 N.L.R.B. 1150 (1976), enforced in part, 557 F.2d 1368 (10th Cir. 1977)	15

Cases—Continued: Page

St. John's Hosp. & Sch. of Nursing, Inc. v. *NLRB*, 557 F.2d 1368 (10th Cir. 1977) 18

Woelke & Romero Framing, Inc. v. *NLRB*, 456 U.S. 645 (1982) 13

Zobrest v. *Catalina Foothills Sch. Dist.*, 509 U.S. 1 (1993) 17

Statutes:

National Labor Relations Act, 29 U.S.C. 151 *et seq.*:

§ 7, 29 U.S.C. 157 2

§ 8(a)(1), 29 U.S.C. 158(a)(1) 2, 4

§ 10(e), 29 U.S.C. 160(e) 13

In the Supreme Court of the United States

No. 03-501

STANFORD HOSPITAL AND CLINICS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 325 F.3d 334. The decision and order of the National Labor Relations Board (Pet. App. 25a-30a) and the decision of the administrative law judge (Pet. App. 31a-237a) are reported at 335 N.L.R.B. 488.

JURISDICTION

The judgment of the court of appeals (Pet. App. 240a-244a) was entered on May 15, 2003. A petition for rehearing was denied on June 30, 2003 (Pet. App. 238a-239a). The petition for a writ of certiorari was filed on September 29, 2003. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 7 of the National Labor Relations Act (NLRA), 29 U.S.C. 157, guarantees employees the right "[to] join, or assist labor organizations * * * and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection." Section 7 "necessarily encompasses" the right of employees "effectively to communicate with one another regarding self-organization at the jobsite." *Beth Israel Hosp.* v. *NLRB*, 437 U.S. 483, 491 (1978). Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), makes it an unfair labor practice for an employer "to interfere with, restrain, or coerce" employees in the exercise of Section 7 rights.

This Court has upheld the National Labor Relations Board's "general approach" to the regulation of employee solicitation and distribution of literature in health-care facilities. *Beth Israel Hosp.*, 437 U.S. at 507; *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 778-779 (1979). Under that general approach, a health-care facility must permit employee solicitation and literature distribution during nonworking time in nonworking areas of a health-care facility unless the facility justifies a prohibition as necessary to avoid disruption of health-care operations or disturbance of patients. *Beth Israel Hosp.*, 437 U.S. at 507. The Board presumes, however, that a ban on solicitation and distribution in "immediate patient care areas" is justified. See *Baptist Hosp.*, 442 U.S. at 778-779.

2. Petitioner Stanford Hospital and Clinics (Stanford Hospital) is an acute-care medical facility on the campus of Stanford University in Palo Alto, California. Pet.

App. 2a, 4a.[1] Petitioner also operates Lucile Packard Children's Hospital (Children's Hospital), which is physically connected to Stanford Hospital. *Id.* at 2a, 36a. Both hospitals are configured into patient units, which are also called nursing units. *Id.* at 3a, 86a, 135a. The patient units at both hospitals are reached by walking down a hallway and passing through a set of double doors. *Id.* at 3a. Among other things, the patient units contain waiting areas for use by patients, families, and visitors. *Id.* at 3a-4a. Located outside of the patient units are separate waiting areas, which are also for use by patients, families, and visitors. *Id.* at 4a.

In November 1997, Local 715 of the Service Employees International Union, AFL-CIO (Union) began an organizing campaign among approximately 1400 service and maintenance workers employed by petitioner at the hospitals. Pet. App. 3a, 35a, 38a. In response to the campaign, petitioner promulgated and delivered to employees a solicitation and distribution policy designed "[t]o avoid disrupting patient care and to prevent disturbing our patients and their families." *Id.* at 3a; see *id.* at 115a-118a.

Among other things, petitioner's policy prohibited "solicitations and distributions of literature" between employees "at any time in patient care areas." Pet. App. 116a (the employee-to-employee no-solicitation/no-distribution rule). Petitioner defined "patient care areas" to include, among other locations, all "waiting rooms [and] lounges used by patients and their families or visitors." *Id.* at 3a, 118a. Petitioner's policy also prohibited employees from engaging in "solicitation of or

---

[1] Petitioner is a successor to UCSF Stanford Health Care, which was the respondent employer in the administrative proceedings before the Board. See Pet. App. 4a, 28a.

distribution of literature to nonemployees * * * at all times on [petitioner's] property." *Id.* at 117a (the employee-to-nonemployee no-solicitation/no-distribution rule).

3. Acting on charges filed by the Union, the Board's General Counsel issued a complaint alleging that petitioner violated Section 8(a)(1) of the NLRA, 29 U.S.C. 158(a)(1), by promulgating the employee solicitation and distribution policy. Pet. App. 32a.

After a hearing, an administrative law judge (ALJ) sustained that allegation in pertinent part. Pet. App. 195a-198a, 215a-232a. The ALJ concluded that the employee-to-employee no-solicitation/no-distribution rule is presumptively lawful with respect to the patient units, including the waiting areas in those units, because those areas are "immediate patient care areas." *Id.* at 195a-196a. The ALJ concluded that the rule is not presumptively valid, however, with respect to the waiting areas outside of the patient units. The ALJ further concluded that the rule is overbroad with respect to those areas because petitioner did not establish that it is justified by the potential effect of solicitation and distribution in those areas on the delivery of health care. See *id.* at 196a, 198a, 226a-227a.

In reaching that conclusion, the ALJ considered the testimony of four witnesses presented by petitioner. See Pet. App. 121a-128a, 130a-134a, 137a, 140a-151a, 159a-160a, 199a-208a. The thrust of their testimony was that patients and family members are disturbed by any employee conversations or activities that are unrelated to patient care. See *id.* at 122a, 124a, 140a-143a, 149a, 150a, 216a, 219a; see also *id.* at 8a, 134a-135a n.53, 137a. The ALJ, however, declined to credit fully the testimony of petitioner's witnesses. She found that petitioner permitted employees to discuss controversial

subjects in the waiting areas outside of the patient units and did not "adduce any evidence that conversations concerning union or other solicitations are more disruptive or harmful to patient care" than the "permitted conduct." *Id.* at 216a.

The ALJ also noted that petitioner produced "no specific evidence" that the waiting areas outside of the patient units at Stanford Hospital are all "used by patients or their families." Pet. App. 217a. Even "[a]ssuming some use by patients or their families of some of these rooms," the ALJ found that petitioner did not establish "the frequency of such use or the relation to immediate patient care." *Ibid.* The ALJ noted the lack of evidence that patients or visitors "use[] these areas after 8 p.m. when visiting hours ended at Stanford Hospital" (*ibid.*) and observed that petitioner presented no evidence about "the frequency of patients using * * * waiting areas outside the [patient] units to walk as part of their recovery regimen or otherwise." *Id.* at 221a.

The ALJ also relied on petitioner's failure to produce evidence of "complaints generated by its employees[']solicitation and distribution activities." Pet. App. 224a. Although petitioner annually receives approximately 1200 written complaints from patients at Stanford Hospital and 300 such complaints at Children's Hospital, the ALJ found that "few, if any, involve employee solicitation or distribution." *Id.* at 61a, 119a.

The ALJ also found that the employee-to-nonemployee no-solicitation/no-distribution rule is overbroad. Pet. App. 232a. The ALJ noted that the rule is "not confined to areas impacting patient care" but instead "include[s] all of petitioner's property," including "office buildings" in "remote locations." *Id.* at 230a & n.73. The ALJ found that petitioner made no showing that

patients would receive union literature "outside the hospital buildings or in the cafeterias, gift shops, maintenance or utility areas." *Ibid.* The ALJ found that petitioner did not present "any persuasive evidence [that] such a broad ban is necessary to protect patients." *Id.* at 231a. Based on those considerations, the ALJ concluded that petitioner had not demonstrated "special circumstances" that would justify "the need for a complete ban of solicitation and distribution to non-employees" on all of its property. *Ibid.*

With some modifications not relevant here, the Board affirmed the ALJ's findings and conclusions. Pet. App. 26a-27a. The Board ordered petitioner to cease and desist from promulgating, maintaining, and distributing "overly broad no-solicitation/no-distribution rules," and to "[r]escind or modify" the two rules that were found to be overbroad. *Id.* at 28a, 234a.

4. Petitioner filed a petition for review of the Board's order in the United States Court of Appeals for the District of Columbia Circuit. Pet. App. 1a. The court denied the petition for review in relevant part and enforced the Board's order. *Id.* at 2a.

The court first addressed the overbreadth of the employee-to-employee no-solicitation/no-distribution rule. Pet. App. 8a. The court noted that, to justify the rule's coverage of the waiting areas outside the patient units, petitioner "need demonstrate only 'a likelihood of, not actual, . . . [patient] disturbance.'" *Ibid.* (quoting *Brockton Hosp.* v. *NLRB*, 294 F.3d 100, 104 (D.C. Cir. 2002), cert. denied, 537 U.S. 1105 (2003)). The court concluded that "substantial evidence supports the Board's decision that [petitioner] did not meet even this standard" and that the rule is therefore overbroad with respect to the waiting areas outside of the patient units. *Ibid.* (quoting *Brockton Hosp.*, 294 F.3d at 104).

In so concluding, the court cited "three particularly persuasive elements of the ALJ's analysis" (Pet. App. 8a): (1) the ALJ's "doubts" about the credibility of petitioner's witnesses (*id.* at 13a; see *id.* at 8a-10a); (2) the ALJ's finding that petitioner failed to show that patients used all of the waiting areas outside of the patient units (*id.* at 13a; see *id.* at 10a-12a); and (3) the ALJ's finding that "few if any complaints received by the hospital[s] during the organizing campaign involved solicitation and distribution activities" (*id.* at 13a; see *id.* at 12a). The court concluded that "these three aspects of the ALJ's decision * * * are more than sufficient to support the Board's conclusion that [petitioner] failed to demonstrate that solicitation and distribution activities directed at fellow employees outside patient units were likely to disturb patients." *Id.* at 13a.

The court next upheld the Board's determination that the employee-to-nonemployee no-distribution/no-solicitation rule is also overbroad. See Pet. App. 15a-20a. The court explained that, apart from the location of the activity, "NLRA sections 7 and 8(a)(1) protect employee rights to seek support from nonemployees." *Id.* at 16a. The court then inquired whether "the fact that the solicitation and distribution activities took place on the employer's property give[s] rise to countervailing employer interests that outweigh employee section 7 rights." *Id.* at 18a (applying *Eastex, Inc.* v. *NLRB*, 437 U.S. 556 (1978)).

The court answered that question in the negative. See Pet. App. 18a. The court explained that petitioner contended that "its employees' right to solicit nonemployees is outweighed by the need to 'respect . . . the privacy and sensitivity of patients.'" *Ibid.* (quoting Pet. C.A. Br. 16). "For essentially the same reasons"

that it had concluded that petitioner had "failed to establish a likelihood of patient disturbance that could justify its more limited ban on solicitation of fellow employees," the court also concluded that petitioner "failed to demonstrate that its interest in patient privacy and well-being outweighs its employees' section 7 rights to solicit nonemployees." *Ibid.*

The court rejected petitioner's contention that, "even if section 7 allows solicitation of nonemployees" as a general matter, employees "may not exercise such rights in hospitals." Pet. App. 19a. For that contention, the court noted, petitioner cited this Court's statement in *Beth Israel Hospital* that "a rule forbidding any distribution to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients." *Ibid.* (quoting *Beth Israel Hosp.*, 437 U.S. at 503 n.23). The court explained, however, that "[t]his statement * * * is dicta, for the question before the *Beth Israel Hospital* Court had nothing whatsoever to do with employer authority to restrict solicitation of nonemployees." *Ibid.* "Equally important," the court added, "nothing in *Beth Israel Hospital* suggests that the Court intended to sanction hospital rules that prohibit solicitation and distribution activities unlikely to affect patients or patient care." *Id.* at 19a-20a.

ARGUMENT

The decision of the court of appeals is correct, and it does not conflict with any decision of this Court or of another court of appeals. This Court's review is therefore not warranted.

1. a. Petitioner first contends (Pet. 10-12) that the court of appeals erred in holding that petitioner's employee-to-nonemployee no-solicitation/no-distribution

rule is overbroad. In support of that contention, petitioner asserts that the court's holding means that a hospital cannot enact a rule that "prohibit[s] its employees from soliciting patients and their families on hospital grounds." Pet. 10; see Pet. i (Question 1), 8. That assertion is, however, based on a mischaracterization of petitioner's rule and the court of appeals' decision.

Contrary to petitioner's suggestion, petitioner did not promulgate, and the court of appeals did not address, a rule prohibiting employees from soliciting and distributing literature to *patients and their families.* Rather, petitioner promulgated, and the court held overbroad, a significantly broader rule prohibiting employees from soliciting and distributing literature to all "*nonemployees*" anywhere on hospital property. Pet. App. 2a, 3a, 15a-20a; see *id.* at 117a (quoting petitioner's policy, which stated that "[s]olicitation of or distribution of literature to nonemployees is prohibited at all times on [petitioner's] property"). "Nonemployees" include many individuals other than patients and their families. For example, persons who deliver goods to the hospitals, who attend continuing medical education programs at the hospitals (see *id.* at 101a), or who take tours of the facilities (*id.* at 102a-104a) are encompassed by petitioner's solicitation and distribution ban but would not be covered by a more narrowly tailored ban directed at only patients and their families. Moreover, because petitioner's rule is effective anywhere "on [its] property," the rule applies to many locations where patients and their families are unlikely to be present, for example, the maintenance and utility areas of the hospitals. See *id.* at 230a.

As the court of appeals correctly recognized, on the record developed in this case, petitioner failed to

demonstrate that its blanket ban of all solicitation of and distribution of literature to all nonemployees is necessary to advance its legitimate interest in protecting the privacy and well-being of patients. See Pet. App. 15a-18a, 228a-232a. Notably, in framing its judgment, the court of appeals (like the Board) permitted petitioner to advance its legitimate interests by making appropriate modifications to its overbroad rule. See *id.* at 241a; see also *id.* at 28a, 234a. Thus, for example, nothing in the judgment of the court of appeals or the Board's order forecloses petitioner from adopting a rule prohibiting solicitation of patients and their families on hospital grounds. Because of the limited and fact-bound nature of the court of appeals' actual holding, this Court's review is not warranted.

Petitioner's amici American Hospital Association and Association of American Medical Colleges (AHA/AAMC) also misread the court of appeals' decision. Amici incorrectly contend that the decision "permits direct solicitation of patients, their families, and friends" (Br. 2) and "creates a presumption" that "patients will experience no detrimental effects from *direct* solicitations and distributions simply because they occur outside of narrowly defined patient-care areas" (Br. 7-8). Contrary to those contentions, the court of appeals' decision does not authorize solicitation of patients, their families, and friends on hospital property. Nor does the decision create any new "presumption," much less the presumption described by amici. Rather, as explained above, the court held only that, on the record in this case, petitioner failed to justify a blanket prohibition on solicitation of and distribution of literature to *all nonemployees anywhere on hospital property*—which is materially broader than a ban on solicitation of or distribution of literature to patients

and their visitors. Apart from their claims based on their misconstruction of the court's opinion, amici (like petitioner) do not contend that the court applied an improper analytical framework in reaching that fact-bound determination.

b. Petitioner and AHA/AAMC also contend (Pet. 8, 10; Amici Br. 5-6) that, in *Beth Israel Hospital* v. *NLRB*, 437 U.S. 483 (1978), this Court authorized hospitals to promulgate blanket bans on solicitation of and distribution of literature to all nonemployees. That contention lacks merit.

Petitioner and AHA/AAMC premise that argument entirely on the Court's statement in a footnote in *Beth Israel Hospital* that "a rule forbidding any distribution to or solicitation of nonemployees would do much to prevent potentially upsetting literature from being read by patients." 437 U.S. at 503 n.23. But the court of appeals' conclusion that petitioner's employee-to-nonemployee no-solicitation/no-distribution rule is overbroad is consistent with this Court's approving reference to "a rule forbidding any distribution to or solicitation of nonemployees." *Ibid.* The Court was evidently referring to a rule of the type promulgated by the hospital in that case, which provided that "[t]here is to be no soliciting of the general public (*patients, visitors*) on Hospital property." *Id.* at 486 (emphasis added); see *id.* at 503 n.23 (explaining that "[p]etitioner, in fact, has such a rule"). As described above, this case involves a materially broader rule, which is not limited to solicitation and distribution directed at patients and visitors but prohibits solicitation and distribution directed at *all* nonemployees, a category that also encompasses delivery persons and individuals attending continuing medical education programs at the hospitals. See p. 9, *supra*.

c. Petitioner further errs in contending (Pet. 12) that the court of appeals required petitioner to demonstrate an "actual adverse effect" on patient care in order to justify its employee-to-nonemployee no-solicitation/no-distribution rule. On the contrary, the court of appeals expressly stated that petitioner had to demonstrate only a "likelihood of, not actual," disturbance to patients. Pet. App. 8a; see *id.* at 18a. That test fully accords with this Court's precedent. See *NLRB* v. *Baptist Hosp., Inc.*, 442 U.S. 773, 781 n.11 (1979) (relevant inquiry is whether solicitation is "likely" to disrupt patient care or disturb patients); *Beth Israel Hosp.*, 437 U.S. at 500 (relevant inquiry is whether patient care is "likely" to be disrupted).

Petitioner mistakenly objects (Pet. 12) to the court of appeals' reliance on an ALJ finding that "regular leafleting" by the Union outside the hospitals had not resulted in "any adverse effect upon patient care." Pet. App. 19a; see *id.* at 231a-232a. The court of appeals' consideration of that ALJ finding is also fully consistent with this Court's precedent. See *Beth Israel Hosp.*, 437 U.S. at 502 (finding it "especially telling" that limited solicitation in the cafeteria for a significant period of time had occurred "without untoward effects" on patient care).

d. Petitioner incorrectly seeks (Pet. 11-12) to support its employee-to-nonemployee no-solicitation/no-distribution rule by relying on Board precedent approving no-solicitation rules in retail stores. See also AHA/AAMC Amici Br. 9 (making similar argument). There is no merit to that contention. The Board permits retail stores to prohibit employee-to-employee solicitation on the selling floor, and in restaurants within retail stores where customers and employees are in "close contact," because, in those circumstances, the

employees' activity is "as apt to disrupt the [retail store's] business as is such solicitation carried on in any other portion of the store in which customers are present." *Goldblatt Bros.*, 77 N.L.R.B. 1262, 1263-1264 (1948). That principle, however, is inapposite where, as here, the no-solicitation rule is overbroad. As discussed above, petitioner's rule operates everywhere on petitioner's property, not just in locations where patients and their visitors are likely to be present.

2. Petitioner also challenges (Pet. 13-15) the court of appeals' conclusion that petitioner's employee-to-employee no-solicitation/no-distribution rule is overbroad to the extent that it includes waiting areas located outside of the patient units. Petitioner contends (Pet. 13) that this Court should resolve an issue "left undecided" in *Baptist Hospital* and hold that the Board's definition of "immediate patient care areas" is irrational because it does not include "nearby waiting areas where patients and their families receive medical advice and counseling." That issue is not properly before this Court, however, and petitioner's claim that the Board's interpretation is irrational does not warrant review in any event.

a. Although petitioner now contends that the Board's definition of "immediate patient care areas" is irrational (see Pet. 13-15), petitioner failed to raise that contention before the Board. Petitioner has alleged no "extraordinary circumstances" excusing its failure to do so. Therefore, petitioner is jurisdictionally barred from raising its claim in this Court. See 29 U.S.C. 160(e); *Woelke & Romero Framing, Inc.* v. *NLRB*, 456 U.S. 645, 665-666 (1982); *International Ladies' Garment Workers' Union* v. *Quality Mfg. Co.*, 420 U.S. 276, 281 n.3 (1975).

Moreover, this case does not present the issue framed by petitioner, *i.e.*, whether immediate patient care areas must rationally include "nearby waiting areas where patients and their families receive medical advice and counseling." Pet. 13. The waiting areas located outside of the patient units at petitioner's hospitals have not been shown in this case to be locations where "patients and their families receive medical advice and counseling." Rather, as both the Board and the court of appeals found, petitioner did not demonstrate that patients and their families actually make use of all the waiting areas outside of the patient units. Nor did petitioner establish that, to the extent that some patients and their family members use some of those waiting areas, the usage involves the delivery of patient care during all hours of the day and night, when petitioner's rule was operative. See Pet. App. 10a, 217a, 221a.[2]

b. In any event, petitioner's challenge to the validity of the Board's definition of "immediate patient care areas" is based on a mischaracterization of the Board's current definition, which is materially different from the definition in effect when this Court decided *Baptist Hospital*. As petitioner notes (Pet. 13), the Board's definition at that time was limited to patients' rooms, operating rooms, and treatment rooms. See *Baptist*

---

[2] See also Pet. App. 222a (ALJ's finding that the medical staff at Children's Hospital does not discuss "sensitive material" with families in the waiting areas outside the patient units); *id.* at 222a-223a (ALJ's finding that, although the employee-to-employee no-solicitation/no-distribution rule applies "twenty-four hours a day, seven days a week," there are times during the day when there is "little or no use" of the waiting areas outside the patient units "by medical care professionals meeting with patients or their families, or by patients and their families or other visitors").

Hosp., 442 U.S. at 780-781 & 781 n.10 (discussing *St. John's Hosp. & Sch. of Nursing, Inc.*, 222 N.L.R.B. 1150 (1976), enforced in part, 557 F.2d 1368 (10th Cir. 1977)). The Court in *Baptist Hospital* expressed "serious doubts" about the Board's initial definition. See 442 U.S. at 789. Contrary to petitioner's implication that the Board did not respond to the Court's concerns, the Board broadened its definition after the decision.

Based on "further experience with hospital no-solicitation rules," the Board extended its definition of "immediate patient care areas" to include "halls and corridors adjacent to" immediate patient care areas (*Central Solano County Hosp. Found., Inc. (Intercommunity Hosp.)*, 255 N.L.R.B. 468, 472 (1981)) and waiting rooms adjacent to immediate patient care areas (see *Doctors' Hosp. of Staten Island, Inc.*, 325 N.L.R.B. 730, 735 (1998)). Moreover, the Board readily concludes that hospitals have justified prohibitions on solicitation in other locations. See, *e.g.*, *Presbyterian/St. Luke's Med. Ctr.*, 258 N.L.R.B. 93, 98 (1981) (hallways, elevators, and stairways "utilized for the movement of patients and emergency equipment"), enforced, 723 F.2d 1468 (10th Cir. 1983); *Intercommunity Hosp.*, 255 N.L.R.B. at 473 (lobby and waiting room "used by staff to take medical histories and for conferring with the family and friends of patients"). Likewise, the court of appeals has not been reluctant to decline to enforce Board decisions invalidating solicitation bans when the record reflects the potential for disrupting patients and visitors. See, *e.g.*, *Baylor Univ. Med. Ctr.* v. *NLRB*, 662 F.2d 56 (D.C. Cir. 1981) (remanding for reconsideration of Board decision invalidating ban on solicitation in cafeteria). In light of these decisions, petitioner is unpersuasive in contending (Pet. 13) that patient well-being can be

protected only by further expanding the Board's definition of "immediate patient care areas."

Petitioner also argues (Pet. 15-16) that the evidence in this case indicates that there are no differences between the waiting areas outside of the patient units and those inside the patient units that justify treating solicitation and distribution differently in the two types of areas. That fact-bound contention does not warrant this Court's review and is, in any event, unpersuasive.[3]

3. Finally, petitioner contends (Pet. 17-18) that this Court should resolve an issue "left undecided" in *Beth Israel Hospital* and hold in this case that the Board must consider "the availability of other areas of the hospital for solicitation and organizational activity" in determining whether a hospital may prohibit employee-to-employee solicitation in a particular area. Petitioner did not raise that claim before the court of appeals, however, and the court did not address it. The claim is therefore not properly preserved for review by this

---

[3] For example, petitioner contends (Pet. 15-16) that employees routinely eat meals in day rooms located inside the patient units, and sometimes eat in the waiting areas outside of the patient units. As the ALJ found, however, notwithstanding some employee use of the day rooms for such purposes, those rooms are "clearly * * * used by patients and their families to visit and are overseen by the staff for patient care." Pet. App. 196a. The same is not true of the waiting areas outside of the patient units. See *id.* at 10a, 217a (finding by ALJ and court of appeals that petitioner did not establish that patients and their families use all the waiting areas outside of the patient units or that any usage is related to patient care). Furthermore, petitioner's claim that the uses of the two types of waiting areas are similar is inconsistent with the ALJ's finding that petitioner permitted employees to use the waiting areas outside of the patient units "for all purposes other than solicitation and distribution," including parties, craft sales, and bake sales. *Id.* at 225a.

Court. See *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999); *Zobrest* v. *Catalina Foothills School Dist.*, 509 U.S. 1, 8 (1993).

In any event, the claim lacks merit. In deciding whether the hospital in *Beth Israel Hospital* had justified a ban on employee-to-employee solicitation and distribution in the cafeteria, this Court indicated that "the availability of one part of a health-care facility for organizational activity *might* be regarded as a factor to be considered in evaluating the permissibility of restrictions in other areas of the same facility." 437 U.S. at 505 (emphasis added). The Court did not suggest, however, that the Board must consider that factor in every case; rather, the Court noted that, in some cases, that consideration may be "inapposite." *Ibid.* The Board and the courts of appeals have since concluded that the availability of alternative areas for employee organizational activity is of "marginal importance" when, as in this case, the hospital has not demonstrated that permitting organizational activity in the area in which that activity is restricted would likely have a detrimental impact on patient care. See *Brockton Hosp.* v. *NLRB*, 294 F.3d 100, 105 (D.C. Cir. 2002), cert. denied, 537 U.S. 1105 (2003); *NLRB* v. *Southern Md. Hosp. Ctr.*, 916 F.2d 932, 936 (4th Cir. 1990) (per curiam). Petitioner offers no reason to question that conclusion.

Moreover, even considering petitioner's proposed alternative locations, its argument that employee-to-employee solicitation should not be permitted in the waiting areas outside of the patient units is unpersuasive in the absence of a showing that such solicitation would likely have a detrimental impact on patient care. Although petitioner asserts (Pet. 18) that employees have adequate opportunity to solicit other employees in hos-

pital cafeterias and employee break rooms, petitioner has not offered facts establishing that those locations are a "natural gathering are[a]" for the hospitals' approximately 7000 employees, including the 1400 service and maintenance workers that the Union was seeking to organize here. *Beth Israel Hosp.*, 437 U.S. 505; see Pet. App. 2a. Cf. *Beth Israel Hosp.*, 437 U.S. at 490 (noting that 77% of the hospital cafeteria's patrons were employees); *St. John's Hosp. & Sch. of Nursing, Inc.* v. *NLRB*, 557 F.2d 1368, 1375 (10th Cir. 1977) (noting stipulation that at least 80% of the employees used an employee-only lunchroom and cafeteria on a daily basis) (cited at Pet. 18).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

THEODORE B. OLSON
Solicitor General

ARTHUR F. ROSENFELD
General Counsel
JOHN E. HIGGINS, JR.
Deputy General Counsel
JOHN H. FERGUSON
Associate General Counsel
JOHN EMAD ARBAB
Assistant General Counsel
National Labor Relations Board

DECEMBER 2003